

BEFORE THE THREE MEMBER DUE PROCESS PANEL
PURSUANT TO RSMo. §162.961

,)	
)	
Petitioner,)	
vs.)	
)	
MOUNTAIN VIEW-BIRCH TREE)	
R-III SCHOOL DISTRICT,)	
)	
Respondent.)	

COVER SHEET INFORMATION

1. ("Student") is the son of ("Parent"). Student was born on.
2. At all times material to this due process proceeding, Student resided with Parent in Birch Tree, Missouri 65438, which residential address is located within the boundaries of the Mountain View-Birch Tree R-III School District.
3. The Parent and Student were represented at the hearing by Student's mother.
4. The Mountain View-Birch Tree R-III School District was represented by:

Peter G. Yelkovac
Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.
425 South Woods Mill Road, Suite 300
Chesterfield, Missouri 63017
5. Parent initially requested due process by letter to the Department of Elementary and Secondary Education ("DESE") which was received by DESE on May 9, 2003.
6. The hearing panel:

Marilyn Bohnsack, designed by School District
Ms. Charlene Hamilton, designated by Parents
Mr. Richard H. Ulrich, Chairperson

7. Issue:

Did Mountain View-Birch Tree R-III School District appropriately determine that Student did not qualify for services as a student with disabilities under the Individuals With Disabilities Education Act?

8. The due process hearing was held on June 23, 2003.

9. The Decision was rendered on August _____, 2003.

CERTIFICATE OF SERVICE

I do hereby certify a copy of the foregoing Decision was delivered via Federal Express this 29th day of August, 2003, addressed to:

Parent

Pete Yelkovac
425 S. Woods Mill Road
Chesterfield, MO 63017
Attorney for School District

Ms. Pam Williams
Missouri Department of Elementary
and Secondary Education
Special Education Compliance
Post Office Box 480
Jefferson City, Missouri 65102

I do hereby further certify a copy of the foregoing Decision was placed in the U.S. Mail, postage prepaid this 29th day of August, 2003 addressed to:

Charlene Hamilton
11935 Bridgevale Avenue
Spanish Lake, MO 63138
Panel Member

Marilyn Bohnsack
4530 Ferbet Est. Drive
St. Louis, MO 63128
Panel Member

BEFORE THE THREE MEMBER DUE PROCESS PANEL
PURSUANT TO RSMo. §162.961

STUDENT,)
)
Petitioner,)
vs.)
)
MOUNTAIN VIEW-BIRCH TREE)
R-III SCHOOL DISTRICT,)
)
Respondent.)

DECISION

This Decision is the final decision of the hearing panel in an impartial due process hearing pursuant to the IDEA, 20 U.S.C. §1415(f) (1997), and Missouri Law, §162.961.3 RSMo.

The Parties

- The Student is
- Student's Parent is
- The Respondent is Mountain View-Birch Tree R-III School District
- Student's mother presented his case
- The School District was represented by Peter G. Yelkovic of Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C., 425 South Woods Mill Road, Suite 300, Chesterfield, Missouri 63017.

Hearing Officers

- Ms. Marilyn Bohnsack - Designated by School District
- Ms. Charlene Hamilton - Designated by Parent
- Richard H. Ulrich - Hearing Chairperson

Relevant Dates/Procedural History/Explanation of Deviation from 45 day time line

1. Parent requested due process concerning Student by submitting a Due Process Hearing Request form to the Department of Elementary and Secondary Education ("DESE") which was received by DESE on May 9, 2003. Thus, the deadline for hearing the case and completing and mailing a written decision was June 23, 2003.

2. At the request of both parties and by order of the Chairperson dated May 30, 2003, the initial timeline of June 23, 2003 was extended and the hearing was set for June 23rd and 24th, 2003 with the decision to be rendered no later than July 24, 2003 (Respondent's Exhibit A p. 1).

3. On or about June 19, 2003, District filed a Motion to Dismiss and Motion in Limine (Panel Exhibit 1).

4. By order of the Chairperson on June 20, 2003, the District's Motion was denied (Panel Exhibit 2).

5. The hearing was held on June 23, 2003.

6. After evidence was presented, upon agreement by the parties and assurance by the court reporter that the transcript would be compiled by July 14, 2003, it was ordered that the parties had until July 24, 2003 to file post-hearing filings which could include a proposed findings of fact, conclusions of law and decision, and the decision was to be rendered on or before August 15, 2003 (Panel Exhibit 4).

7. Parent received a copy of the transcript on July 18, 2003 and requested a continuance from July 24, 2003 to August 7, 2003, to file post-hearing materials including proposed findings of fact, conclusions of law, with the decision to be rendered on or before August 29, 2003. This request was granted (Panel Exhibit 5).

Issue

Did Mountain View-Birch Tree R-III School District appropriately determine that Student did not qualify for services as a student with disabilities under the Individuals With Disabilities Education Act?

FINDINGS OF FACTS

1. This matter involves the issue of whether the Mountain View-Birch Tree R-III School District appropriately determined that Student did not qualify for services as a student with disabilities under the Individuals With Disabilities Education Act.

2. The hearing panel consists of Richard H. Ulrich, Esq., chairperson; Ms. Marilyn Bohnsack (District's selection); and Ms. Charlene Hamilton (Parent's selection).

3. A due process hearing was held on June 23, 2003. Petitioner was not represented by counsel. Student's mother presented Petitioner's case and was assisted by an advocate. The District was represented by Peter G. Yelkovic of Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C. Both parties presented written evidence and had the opportunity to call and cross-examine witnesses. Beth Mallis, a court reporter, was present and made a full record of the proceedings.

4. Student has resided in the Mountain View-Birch Tree R-III School District (the "District"), at all times relevant to this matter, with his mother ("Mother"). (Exs. R-H at 43, X at 166).¹ Student lives with his brother, sister, and step-father. (Ex. R-Z at 176). Student was in the fifth grade at Birch Tree Elementary during the 2002-2003 school year. (Exs. R-C, R-H at 43).

5. In December 2000, Mother completed a District Parent Input/Contact Form – Screening Information. (Ex. R-W). The concern noted by Mother was that Student was not bringing work home and was not organized. (Ex. R-W at 158). No concerns in the social/emotional/behavioral area were noted. (Ex. R-W at 158).

¹ All references to Respondent's exhibits are to "Ex. R-". References to Parent's Exhibits are to "Ex. P-". References to hearing testimony are to "Tr.".

6. On December 5, 2000, a conference was conducted to discuss a referral by Mother. (Ex. R-V). The Conference Summary indicated that testing would be conducted. (Ex. R-V).

7. A Behavioral Correlates of Psychological Processing Deficits checklist was completed in January 2001. (Ex. R-U at 146). In the area of Listening Comprehension, “sometimes” or “seldom” was checked for all but one of the noted behaviors. (Ex. R-U at 146).

8. An Evaluation Plan was developed on January 9, 2001. (Ex. R-V at 144). No concerns were noted in the social/emotional/behavioral area. (Ex. R-U at 142).

9. On the Wechsler Intelligence Scale for Children-III (“WISC”), Student had a verbal score of 92, a performance score of 108, and a full scale score of 99. (Ex. R-Q at 127). The hearing panel finds that these results still provably provide an accurate measure of Student’s cognitive ability, and in any event provide Student with a favorable standard in regard to ascertaining his eligibility for services. (Tr. I:50-51, 83; Tr. II:315).

10. Student was administered the Woodcock-Johnson Psycho-Educational Battery – Revised Tests of Achievement on January 17, 2001. (Ex. R-Q at 124). The following standard scores were obtained: broad reading – 102; reading skills – 99; reading comprehension – 101; broad math – 90; math skills – 82; math reasoning – 97; broad written language – 78; written expression – 88; skills – 90. (Ex. R-Q at 126).

11. One criterion for eligibility under the category of specific learning disability is that a significant discrepancy exists between the Student’s achievement and intellectual ability. (Missouri State Plan at P. 18). In January 2001, the Missouri State Plan included a table that provided criterion levels for IQ scores on the WISC. The criterion level for a WISC score of 99

was a standard score of 81. Based on the January 2001 scores, Student missed this standard only in the area of written language. (Ex. R-Q at 126).

12. As part of the January 2001 evaluation, an observation of Student in the classroom was conducted. (Ex. R-Q). No problems in the areas of attention span, impulse control, or appropriate verbal/physical behavior were noted. (Ex. R-Q). Student complied with classroom rules and interacted with peers and the teacher appropriately. (Ex. R-Q).

13. On March 12, 2001, a multidisciplinary team met to consider the evaluation results. (Ex. R-O). The team included Mother. (Ex. R-O at 119). The team concluded that Student did not meet the eligibility criteria to be diagnosed with a disabling condition. (Ex. R-O at 118; Ex. M). Although Student's standard score of 78 in broad written language was slightly below the criterion level of 81, the team found that he did not have a disabling condition.

14. Tina Spencer, the District's Director of Special Education, explained that the team found Student not to be eligible because of his standard score of 88 in the related areas of written expression. (Ex. R-N; Tr. I; 165-66, 169). Student's classroom teacher agreed with the conclusion that Student did not have a disability. (Tr. I: 166). Pam Adams testified similarly to Ms. Spencer. (Tr. II: 307-08). The hearing panel finds this testimony to be credible.

15. In October 2002, a screening for special education services was conducted. (Ex. R-I; Tr. I: 29-30). A speech/language screening was conducted. (Ex. R-I at 58). Because the results showed Student to be 15 points below the recommended score, further evaluation was conducted. (Ex. R-I). General health was noted to be good and it was noted that Student was seeing a physician regarding growth. (Ex. R-I at 59).

16. A Student Health Inventory completed by Mother on October 9, 2002, noted no health concerns. (Ex. R-I at 61-62). Mother also completed a Parent Input/Contact Form –

Screening Information on October 9, 2002. (Ex. R-I at 63-64). She noted that Student's general health was good. (Ex. R-I at 63). The only concern noted by Mother was that Student "can't keep focused." (Ex. R-I at 64).

17. On October 25, 2002, a request for consideration for special education evaluation was completed by Pam Adams, special education teacher for the District. (Ex. R-J). The concerns that prompted the request were noted to be ability to comprehend and follow directions and academics. (Ex. R-J).

18. A Summary of Existing Data/Evaluation Plan was completed on October 29, 2002. (Ex. R-I at 65-67). Concerns were noted only in the areas of speech/language and academic. (Ex. R-I at 66). The Summary noted that William was proficient in fourth grade MAP (a Missouri standardized test) testing in the area of math and social studies. (Ex. R-I at 66; Tr. I: 40-41).

19. A multidisciplinary team met on December 17, 2002, to consider the evaluation results and an Evaluation Report Summary was produced. (Ex. R-H; Tr. I: 68). As of October 25, 2002, Student's grades were: Math – D+; Language Arts – C; Reading – B; Social Studies – F; AR – F; and Science – D+. (Ex. R-H at 44). Teachers noted that Student was disorganized, did not turn in work on time, had difficulty getting started, had difficulty staying on task, and had difficulty completing work. (Ex. R-H at 44). Various alternative intervention strategies had been used. (R-H at 44). Those strategies also were used with children without disabilities. (Tr. I: 79-80; Tr. II: 269). The Evaluation Reported noted that Student had recently been found to have a seizure disorder, that evaluations were still in progress, that Student had been taking Depakote since December 13, 2002, and that it was unknown whether the medication would cause side effects or be effective in controlling the seizures. (Ex. R-H at 45). Information regarding the

seizures were first reported verbally by Mother at the December 17, 2002 evaluation meeting. (Tr. I: 71).

20. At the time the Evaluation Report was completed, the method for determining whether a significant discrepancy existed for purposes of a learning disability had changed from the January 2001 evaluation. (Tr. I: 130). Based on the full scale score of 99 on the 2001 WISC, Student's criterion level was now 77 (Missouri State Plan at P. 18). The Evaluation Report incorrectly states that the level is 75.

21. Carol Bultmann, a licensed speech language pathologist and the District's speech language evaluator, conducted evaluations related to language on November 7, 2002. (Ex. R-H at 46-47). The results of the tests were: Peabody Picture Vocabulary Test – Third Edition, Standard Score Equivalent – 97, Age Equivalent – 10 years, 1 month; Expressive One-Word Picture Vocabulary Test-2000, Standard Score Equivalent – 95, Age Equivalent – 9 years, 10 months; Expressive Vocabulary Test, Standard Score Equivalent – 86, Age Equivalent 8 years, 6 months; Oral and Written Language Scales, Listening Comprehension Standard Score – 82, Oral Expression Standard Score – 83; Test of Word Knowledge, Composite Score – 97. (Ex. R-H at 46-47). An informal language sample was elicited. (Ex. R-H at 47). Student's mean length of utterance was above average and he had adult sentence structure in 22/25 responses that were grammatically correct with no errors in syntax or semantics. (Ex. R-H at 47). Ms. Bultmann also observed Student and found that he had no difficulties with communication skills or language. (Ex. R-H at 46). Ms. Bultmann testified that she did not believe Student had a disability in the area of speech language. (Tr. II: 286-294). The Panel finds this testimony credible.

22. The Woodcock-Johnson Psycho-Educational Battery-Revised was administered by Pam Adams on November 11, 2002. The following standard scores were obtained: broad reading – 97; reading skills – 100; reading comprehension – 100; broad math – 99; math skills – 85; math reasoning – 107; broad written language – 87; writing skills – 87; written expression – 90; and skills – 94. (Ex. R-H at 51). None of these scores falls below the criterion level of 77.

23. Clara Robinson, a counselor for the District, conducted observations as part of the evaluation. (Ex. R-H at 53). She reported that Student appeared to learn no differently than his peers and that he remained on task while a test was conducted. (Ex. R-H at 53-54).

24. During the meeting on December 17, 2002, the team concluded that no handicapping condition existed because there was no significant discrepancy between achievement and ability in any qualifying area. (Ex. R-H at 55).

25. In a letter to Larry Wood, the principal of Birch Tree Elementary, dated December 19, 2002, Dr. Nitin Patel stated that Student had been diagnosed with seizures. (Ex. R-G at 31). Dr. Patel stated that Student was having multiple daily episodes where he stared off into space for about one minute and was unresponsive. (Ex. R-G at 31). Dr. Patel noted that it could be determined whether Student was experiencing a seizure by using a visual threat to see if he blinked; if he did not blink, the episode was most likely a seizure. (Ex. R-G at 31).

26. A December 13, 2002 neurological examination noted that Student’s “attention span is normal.” (Ex. R-G at 36).

27. After receiving information about the seizure disorder shortly after the December 17, 2002 staffing, Student’s teachers observed him to determine whether he was experiencing seizures at school, and, if so, how they affected him. (Tr. I: 136, 139-140; Tr. II: 235-36). The teachers did not observed that Student was experiencing seizures. (Ex. R-G at 30; Tr. I: 139-40,

152, 153, 156; Tr. II: 235-36, 239-41, 267, 271). Ms. McClure, classroom teacher, noted that Student responded to his name when he appeared to be drifting. (Tr. II: 236). Given that the teachers had the opportunity to observe Student on a daily basis, the Panel credits this testimony. Dr. Patel also indicated in the letter that seizures would be stabilized through medication. (Ex. R-G at 31).

28. Little evidence was presented showing the precise nature of the seizure disorder. Important for purposes of this proceeding, no evidence shows that the seizure disorder adversely affects Student's educational performance.

29. On January 22, 2002, Spencer completed a request for consideration for special education evaluation from Ms. Frost. (Ex. R-F). The concern noted at the time was that Student had seizures. (Ex. R-F). A Summary of Existing Data/Evaluation Plan as completed on February 14, 2003. (Ex. R-F at 20-22). Parent input was provided. (Ex. R-F at 20). The determination was made that no additional assessment was needed. (Ex. R-F). On February 20, 2002, Student's third quarter grades were: Reading – B; Language – C+; Math – D-; Science – C; AR/Projects – F; and Social Studies – A-.

30. On February 26, 2003, a meeting was held to review screening information. (Ex. R-E).

31. On February 26, 2003, a Notice of Action was prepared refusing to conduct an evaluation because screening showed that there was no reasons to suspect a disability at the time. (Ex. R-D).

32. On or about May 13, 2003, the District receive a neuropsychological evaluation conducted at the Rusk Rehabilitation Center, University of Missouri-Columbia, after Mother filed this request for due process. (Ex. R-Z; Tr. II: 195). Observations at the time of testing

noted that Student was alert, eye contact was good, speech was fluent, goal-directed, and evidenced no unusual characteristics, movements were fluent and no unusual mannerisms or movements were noted. (Ex. R-Z at 177-78). Student was noted to be socially engaging, at ease, and a pleasant boy. (Ex. R-Z at 177-78). The evaluation stated that “results of behavioral questionnaires completed by his mother and teacher indicated significant difficulty with inattention consistent with the diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD).” (Ex. R-Z at 178). The ADHD diagnosis was noted to be “provisional.” (Ex. R-Z at 179). A “Time Documentation” was included as part of the evaluation. The time noted was: Interview and review of records: 1.5 hours; interpretation of data and completing report: 1.5 hours, all conducted by Dr. Orme. Testing administered by technician under Dr. Orme’s direct supervision: 2.0 hours. Total Time: 5.0 hours.” (Ex. R-Z at 180).

33. Despite an offer by the District, Mother declined to meet with the District to consider the Rusk evaluation, however, Ms. Spencer indicated to Mother that the report was consistent with the team’s decision. (Tr. II: 195-96). The Panel finds that the Rusk Evaluation above provides an insufficient basis upon which eligibility for special education services under the IDEA can be established. This ADHD diagnosis is provisional, based on only minimal contact with Student and does not make any reference to the required causation between ADHD and its impact on Student’s education.

34. School staff members testified that behaviors exhibited by Student did not reach the level they would expect for a child affected by ADHD, but he has had symptoms compatible with ADHD. (Tr. I: 59, 156; Tr. II: 235-36, 247, 269). The Panel finds this testimony to be credible.

35. Testimony by school staff members demonstrates that Student's behavior with respect to things such as attention span, organization, and focus is not non-typical of fifth grade students. (Tr. I: 61, 63, 119-20, 162-63; Tr. II: 227-28, 243, 245, 256-60, 280). The Panel finds this testimony to be credible. The Panel notes and credits testimony that the fifth grade year in particular is more difficult for many students because it is a year of transition. (Tr. II: 226). In fourth grade, students have only one teacher. (Tr. II: 226). In fifth grade, students for the first time move between classes and have three teachers. (Tr. II: 226). Even if the ADHD diagnosis is correct, the Panel finds that sufficient evidence was not presented to illustrate that the ADHD adversely affects Student's educational performance.

36. At the time of hearing, Student was served during the regular school day in regular education with some accommodations described by District as modifications. Student did not receive any special education services as requested by Mother as the District deemed, after testing, that he was not disabled under the Individuals With Disabilities Act ("IDEA").

37. At the time of the hearing, Student had struggled in Math, Social Studies and Accelerated Reading having received a D, F and F respectively for the second semester, fifth grade.

38. Student's grades are not what would be expected given his ability. When asked, all of the school staff members stated that his poor grades are not the result of a disability. Instead, they agreed that the grades are the result of choices made by Student and that he can successfully complete work when he chooses to do so. (Tr. I: 148-49, 178; Tr. II: 214, 230-31, 235, 239). The comment by Student after doing well on a test that, "I studied this time" is consistent with this testimony. (Tr. II: 264-65). Similarly, Student told his teacher that he didn't like homework, he did not have time, that he had a lot of chores, and it was hard for him to get

help. (Tr. II: 266). The Panel notes that Student had declined the opportunity to receive tutoring that is available at school and to attend summer school. (Tr. I: 159; Tr. II: 220, 233).

39. The Missouri Department of Elementary and Secondary Education (“DESE”) received a due process hearing request from Mother on May 9, 2003. (Ex. A at 3). In her request, Mother noted that Student was evaluated in December “and denied” and that her request for a subsequent evaluation was denied. (Ex. R-A at 11). Mother stated that Student’s disability “keeps him from focusing & completing his work.” (Ex. R-A at 11).

CONCLUSIONS OF LAW

As previously stated, the issue in this case is whether the District appropriately determined that Student did not qualify for services as a student with disabilities under IDEA. The District reached its conclusion that Student did not qualify in March 2001 and on two subsequent occasions. The Panel will consider each of these decisions.

I. The Individuals With Disabilities Education Act.

Under the Individuals With Disabilities Education Act (“IDEA”), all children with disabilities are entitled to a free appropriate public education (“FAPE”) designed to meet their unique needs. 20 U.S.C. § 1412. The term “child with a disability” is defined by the IDEA to mean “a child evaluated [as having one of the IDEA’s enumerated disabilities] and who, by reason thereof, needs special education and related services.” 34 C.F.R. § 300.7(a). The Missouri State Plan defines and provides eligibility criteria for each disability category under the IDEA. The Panel is constrained to follow the eligibility requirements established by law.

II. Does Student have a learning disability as defined by IDEA and the Missouri State Plan?

The IDEA contains a two-part test for determining eligibility for special education services. First, a student must meet the criteria for one of the categorical diagnoses and second,

the student must need special education because of the disability. 34 C.F.R. § 300.7(a). Pursuant to the Missouri State Plan, a specific learning disability “means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations.” State Plan at P. 18. Under the State Plan, the existence or continued existence of a specific learning disability may be found only if the student demonstrates a significant discrepancy between ability and achievement in one of the specified areas. State Plan at P. 18.

The District argues that in addition to the requirement that there has to be a significant discrepancy between ability and achievement in one of the specific areas, it must be shown that the student also displays observable characteristics that indicate deficits in basic psychological processing, citing page 18 of the State Plan. While this point is not part of the Panel’s decision, and is academic, the Panel is not convinced of this additional requirement. Paragraph B, P. 18 of the State Plan reads:

B. . . . the child displays observable characteristics that indicate deficits in basic psychological processing. The team finds a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas. A severe discrepancy is defined as 1.5 standard deviation between cognitive and academic areas.

Basic reading skill	Mathematics reasoning
Reading comprehension	Listening comprehension
Written expression	Oral expression
Mathematics calculation	

Determining dysfunction in the central nervous system or a psychological processing deficit is difficult, if not impossible, to ascertain by current psychological and/or medical tests. Therefore, psychological processing deficits are presumed and inferred through observation of behavior. Such behaviors include difficulty in academic and learning tasks, a discrepancy between potential and achievement, an uneven growth pattern, and the exclusion of other causes;. . .

Accordingly, even though both the requirements are part of paragraph B, they are not stated in the conjunctive. Of interesting note is that the 1996 State Plan, P. 20, specifically states both requirements in the conjunctive, and further states, “such students must meet other components (other than the standard deviation requirement) of this eligibility criteria. This language requiring all components be met is conspicuously absent in the 2001 State Plan.

In March 2001, all but one of Student’s standard scores on the Woodcock-Johnson were above the then-applicable criterion level of 81. The broad written language score of 78 met the criterion level by a narrow margin. Notably, the IDEA requires school districts to ensure that “[n]o single procedure is used as the sole criterion for determining whether a child is a child with a disability.” 34 C.F.R. § 300.532(f). See *Wayne-Westland Community Schools*, 37 IDELR 150 (SEA Michigan 2002) (“the eligibility determination is not simply a matter of administering a number of achievement tests and then ‘cherry picking’ the few lowest standard scores from the entire batch of relevant data”).

Instead of relying solely on a single isolated standard score, District team members considered other related scores and the observations and experiences of teachers and others who had direct contact with Student. There was no evidence that any failure by Student to achieve was based on deficits in basic psychological processing. School personnel’s testimony is significant because it is “based on daily and continuing observation within the classroom environment.” See *Grapevine-Colleyville Indep. Sch. Dist. v. Danielle R.*, 31 IDELR 103 (N.D. Texas 1999).

While the District defended its position of non-eligibility in March of 2001 on the basis that it considered more than just the discrepancy between ability and achievement in the area of

broad written language, its Director of Special Programs for the District, Tina Spencer, testified that the District could have defended eligibility just on that basis.

Although the Panel opines that the District probably was marginally legally justified in its denial of services in March of 2001, such a conclusion is not necessary as any claim by Mother relating to the March 2001 evaluation is barred by the two year statute of limitations. *Strawn v. Missouri State Bd. of Educ.*, 210 F.3d 954, 957-958 (8th Cir. 2000).

Focus must then be directed to the December 2002 determination of non-eligibility by the District. In conjunction with this evaluation, no standard scores on the Woodcock-Johnson fell below the criterion level of 77. In addition to the Woodcock-Johnson, Carol Bultmann, a licensed speech language pathologist, and the District's language evaluator, conducted evaluations related to language and concluded that Student did not have a disability in the area of speech language. Also, Clara Robinson, a District counselor, conducted observations as part of the evaluation and concluded that Student appeared to learn no differently than his peers and that he remained on task while a test was being conducted.

Between March of 2001 and December of 2002, Student displayed that he was proficient in fourth grade MAP (a Missouri standardized test) in the areas of math and social studies.

Several cases support that Student does not have a learning disability. For example, in *Long Beach Unified Sch. Dist.*, the hearing officer concluded that the student was not eligible for special education due to a learning disability. 29 IDELR 818 (SEA California 1998). In that case, the student, a 15 year old tenth grader, was not currently eligible. *Id.* at 3. During ninth grade, the student's grades ranged from Bs to Fs. *Id.* The student received a C in algebra as well as in night grade English. *Id.* The parents requested that the student, however, be evaluated for a learning disability. *Id.* at 4. The District's testing showed average cognitive ability and no

discrepancy between the student's ability and achievement in any area. *Id.* at 5. Accordingly, the District concluded the student was not learning disabled. *Id.* The parent then obtained an independent evaluation in which the evaluator concluded that the student demonstrated the requisite discrepancy in math. *Id.* The evaluator pointed to a 27 point discrepancy between the student's full scale IQ of 98 and his total math score of 71 on the WIAT achievement test. *Id.* at 8. In determining that the student did not have a learning disability in math, the hearing officer reviewed the state criteria and reasoned as follows:

While there is no dispute that a twenty-seven point discrepancy constitutes a severe discrepancy, the Hearing Officer finds that Dr. Patterson's conclusions are contradicted by the other data [other math tests] available. . . . Moreover, Student was able to earn a C in her first semester algebra class, with a B- on her final. . . . [R]eviewing the final exam demonstrates that Student was able to successfully answer a wide range of algebra questions. Although Student had lower grades in math in the past, there was significant testimony from her teachers that Student's work and study habits affect her grades A finding that Student demonstrated a severe discrepancy based solely on the WIAT score would also violate the requirement in the California Education Code. . . that no single procedure be used as the sole criterion for determining the appropriate program. Therefore, the Hearing Officer finds that the preponderance of the evidence established that Student's achievement in math is not severely discrepant from her ability.

Similarly, in *Norton v. Orinda Union Sch. Dist.*, the parents claimed that their son was eligible for services under the IDEA because there was a severe discrepancy between his ability and achievement. 1999 U.S. App. LEXIS 3121 at PP. 3-4 (9th Cir. 1999). The court concluded that the school district's test results were inconclusive whether a severe discrepancy existed, but noted that even if a discrepancy existed, the student's needs could be adequately addressed in a regular education classroom with relatively minor modifications. *Id.* at PP. 8-9. Thus, the student did not need special education and was ineligible for services under the IDEA. *Id.* Notably, in affirming the decision of the hearing officer, the court noted that the hearing officer had relied on testimony and evidence from the student's teachers. *Id.* at P. 8. The evidence in

this case also shows that Student's needs can be addressed in the regular classroom without special education.²

III. Is Student eligible for services under the Other Health Impaired category based on the provisional ADHD diagnosis?

The eligibility criteria for the disability of Other Health Impairment ("OHI") require that (1) a student have a health impairment that has been diagnosed by a licensed physician, licensed psychologist, licensed professional counselor, or licensed clinical social worker; and (2) the impairment adversely affects the child's educational performance. State Plan at P. 18. As the second criterion makes clear, a diagnosis of an impairment by itself is not sufficient to qualify a child for services under the IDEA.

Additionally, the Panel finds insufficient evidence to establish that Student has a diagnosis of ADHD as contemplated by the State Plan. Even though Mother presented information (Parent Ex. 7) that many of Student's behaviors are compatible with an ADHD diagnosis, the diagnosis made by Dr. Orme states that it is "Provisional". It is clear from Dr. Orme's report that he could not determine whether the attention difficulties he noted are associated with ADHD or the previously diagnosed seizure disorder. *See* Ex. R-Z at 179 ("the etiology of [the difficulty with inattention] is unclear. It could represent ADHD, symptoms associated with seizure disorder, or some unknown cause").

Even if the Panel were to accept the ADHD diagnosis as a sufficient basis for eligibility under the OHI category, the Panel finds that evidence was not submitted proving the impairment adversely affects Student's educational performance. The testimony of those who worked most closely with Student at school on a day-to-day basis and other evidence demonstrate that Student

² The Panel notes that the fact that Student's teachers at times have used alternative strategies to attempt to address his needs, does not automatically lead to a conclusion that Student has a disability. Use of such strategies is simply evidence of attempts of good teaching and acknowledges that all children do not learn in the same way and at the same rate. (Tr. II: 269-270).

is like most other fifth grade students with respect to matters such as attention and focus. Experienced staff members who know the manifestations of ADHD in an educational environment consistently and uniformly testified that they did not observe Student to exhibit the kinds of behaviors that they knew to be consistent with an ADHD diagnosis. Faced with similar evidence, the review officer in *Rochester City School District*, 31 IDELR 178 (SEA New York 1999), found that the student's ADHD did not adversely affect the child's educational performance, even though the student's achievement was less than what might have been expected based on the student's ability. The review officer noted testimony of the student's teachers indicating that he was not significantly different than other students. Teachers also noted that the student's performance would have improved if he had completed his homework. In addition, while some of Student's grades were poor, others were not, indicating that any display of possible ADHD was not consistent. In short, the Panel finds that sufficient evidence was not presented to show that Student's possible ADHD adversely affected his educational performance.

IV. Is Student Eligible for services under the Other Health Impaired Category based on a seizure disorder?

At the December 17, 2002 evaluation meeting, the District was first informed by Mother that Student had been diagnosed with seizures. By letter of December 19, 2002, the finding was conveyed to the District by Dr. Nitin Patel. Upon receiving this information about Student's seizure disorder, Student's teachers observed him to determine whether he was experiencing seizures at school, and, if so, how this affected him. The teachers did not observe that Student was experiencing seizures. Dr. Patel also indicated that the seizures could be stabilized through medication and the teachers observed that Student's attention was enhanced after medication was

prescribed and taken. No evidence was presented to display that the seizure disorder adversely affected Student's educational performance.

Little evidence regarding the precise nature of Student's seizure disorder was presented. The Panel cannot presume that the disorder adversely affects Student in an educational setting merely because it has been diagnosed by a physician. The evidence regarding the seizure disorder is similar to the evidence relating to the ADHD diagnosis. The evidence demonstrates that school staff members closely monitored Student to determine whether he was experiencing seizures and, if so, whether the seizures adversely affected Student's educational performance. The evidence fails to show that there was such an effect. Testimony from Student's teachers shows that the seizure disorder did not adversely affect his classroom performance.

To prevail in an attack on the District's evaluation, it is incumbent upon a parent to identify particular omissions in a district's evaluation and then show how these omissions prevented the District from developing an adequate program. See *Judith S. v. Board of Education of Community Unit School Dist. No. 200*, 28 IDELR 728 (N.D. Ill. 1998), 1998 WL409416. It was not shown how any omissions prevented the District from developing an adequate program.

Decision

The limited issue for the Panel to decide is whether Student is legally eligible for services under the IDEA based on a learning disability or under the OHI category. Based on the evidence presented, we find that he is not. Accordingly, the Panel finds in favor of the District and enters judgment in favor of District.

This decision however, is not without reservations. Something is broken in Student's education and needs to be fixed. He lacks organization, has problems focusing and

concentrating, and his grades are below those commensurate with an IQ of 99. The record is replete with his lack of organization and his failure to accomplish in class, resulting in an exorbitant amount of homework. Motivation cannot be measured under the IDEA. Our decision simply holds that, given the constraints of the evidence presented, we cannot hold that the law requires special education services.

What the law requires is not always synonymous with what the student needs. While the District afforded Student some modifications and interventions, they did not produce a successful fifth grade. Apparently, the interventions were not adequately changed to promote accountability. For instance, teachers testified that Student would often take five to ten minutes to get started in class because he lacked a pencil or supplies. Immediately providing the student with needed supplies would have obviated the necessity for Student to go to his locker. On the Parent side of the equation, it is impossible for the Panel to determine the commitment to homework completion and the insistence for accountability.

While the Panel does not have the caulk to fill the crack into which Student has fallen, it recommends, although not legally binding, the following:

- (1) A stool be placed in every classroom for Student's optional use; and
- (2) A daily log between teachers and parent clearly defining what was accomplished at home and at school and the expectations placed on Student; and
- (3) Instead of meeting every month, the Student team meet every other week to define Student's progress and discuss successful interventions; and
- (4) Revisit the May 2003 report of Dr. Orme, without any preconceived notions of what results that consideration might bring; and
- (5) Tutoring services and summer school opportunities be utilized; and

(6) Given the distrust that exists between Mother and the District, appoint a liaison, familiar to and trusted by Mother, to be a part of the Student's team.

Appeal Procedure

PLEASE TAKE NOTICE that this Decision constitutes the final decision of the Department of Elementary and Secondary Education in this matter.

PLEASE TAKE NOTICE that you have a right to request a review of this Decision pursuant to the IDEA and/or Missouri Revised Statute § 162.962(3) and the Missouri Administrative Procedures Act Section 536.010 *et seq.* RSMo. Specifically, Revised Section 162.962(3) RSMo. (as of August 28, 2003) provides in pertinent part as follows:

“1. Judicial review of the hearing panel's decision may be instituted by filing a petition in a state or federal court of competent jurisdiction. Appeals to state courts shall be filed within *forty-five* days after receipt of the notice of the agency's final decision.”

3. Section 53.110 RSMo. provides in pertinent part as follows: The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence. . .”

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. § 300.512.

Dated: August 29, 2003

Richard H. Ulrich, Hearing Officer

Marilyn Bohnsack, Hearing Panel Member

Charlene Hamilton dissents from this opinion
in accordance with her attached opinion.

CERTIFICATE OF SERVICE

I do hereby certify a copy of the foregoing Decision was delivered via Federal Express this 29th day of August, 2003, addressed to:

Parent

Pete Yelkovac
425 S. Woods Mill Road
Chesterfield, MO 63017
Attorney for School District

Ms. Pam Williams
Missouri Department of Elementary
and Secondary Education
Special Education Compliance
Post Office Box 480
Jefferson City, Missouri 65102

I do hereby further certify a copy of the foregoing Decision was placed in the U.S. Mail, postage prepaid this 29th day of August, 2003 addressed to:

Charlene Hamilton
11935 Bridgevale Avenue
Spanish Lake, MO 63138
Panel Member

Marilyn Bohnsack
4530 Ferbet Est. Drive
St. Louis, MO 63128
Panel Member

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